NO. 77-98

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through THE DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HARRY S. FENTON, Chief Counsel
ROBERT F. CARLSON, Assistant Chief Counsel
MILTON B. KANE
BY: MILTON B. KANE
Attorneys for Department of Transportation
1120 N Street, P. O. Box 1438
Sacramento, California 95807
Telephone: (916) 445-3083
Attorneys for Petitioner

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Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in the above-entitled case on March 23, 1977.

OPINIONS BELOW

The Court of Claims case entitled The People of the State of California, acting by and through the Department of Transportation v. United States is reported as 551 F.2d 843 (1977) and appears in Appendix A.

JURISDICTION

This Petition for Writ of Certiorari is being filed within ninety (90) days of the date of entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. section 1255(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation, acting by and through the Federal Highway Administration, has the authority to enact policy and procedure memoranda which require the states to deny just compensation to the owners of property taken for public use.

2. Whether the law of California governs what costs are reimbursable because California law is incorporated into federal law and PPM 21-4.1, paragraph 3a(2).

THE STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 14 of the California Constitution (currently renumbered art. I, § 19) are set forth in Appendix B.

2. Sections 101(a), 106(a) and 120(c) of Title 23 of the United States Code (part of the Federal-Aid Highway Act) are set forth in Appendix C.

3. Policy and Procedure Memoranda 21-4.1, paragraph 6u, 80-1, paragraph 51, and Federal-Aid Highway Program Manual, volume 7, chapter 2, section 2 are set forth in Appendix D.

STATEMENT OF THE CASE

This action was brought by the State of California, acting by and through its Department of Transportation, hereinafter referred to as "California", to recover the sum of $158,941.68 based upon the contractual obligation of the United States imposed by 23 U.S.C. section 106(a). California, in preparation for the construction of Interstate Highway 280, within the city limits of San Jose, entered into an agreement with the Franklin-McKinley School District of Santa Clara County for the purchase of McKinley School. California, in purchasing this facility, recognized that public facilities are not bought and sold in the market, nor are they operated for profit, and, therefore, paid the school district for the replacement cost of a new facility so that the

school district would have a school of equal utility to replace the school taken by the highway pro'ect.

The Court of Claims' jurisdiction was invoked under 28 U.S.C. section 1491. The Court of Claims granted defendant's cross motion for summary judgment and denied plaintiff's motion for summary judgment on March 23, 1977.

REASONS FOR GRANTING WRIT

I

INTRODUCTION

Petitioner submits that the Court of Claims has decided an important question of constitutional law relating to just compensation adversely to principles established by the Federal Government under the Fifth Amendment, the states under the Fourteenth Amendment, and adversely to article I, section 14 of California's Constitution.

Petitioner further asserts that the Court of Claims, in upholding the validity of Policy and Procedure Memorandum 21-4.1, paragraph 6u, has decided the issue according to a federal policy which conflicts with the law of California. This raises important questions for all the states concerning the manner in which the costs of construction of a federal-aid highway project should be reimbursed under the provision of 23 U.S.C. section 106. California submits that the costs of right-of-way for which a state is reimbursed are those costs incurred pursuant to and in conformity with the applicable state law. The Court of Claims not only disregards California law but confers upon the Secretary of Transportation the power to review all of the State's costs of right-of-way.

II

ARGUMENT

1. THE SECRETARY OF TRANSPORTATION, ACTING BY AND THROUGH THE FEDERAL HIGHWAY ADMINISTRATION, HAS ENACTED POLICY AND PROCEDURE MEMORANDA WHICH CONFLICT WITH DECISIONAL LAW WHICH HAS DETERMINED THAT PAYMENT OF JUST COMPENSATION IS A CONSTITUTIONAL RIGHT.

The policy and procedure memorandum which the Federal Highway Administration and the Court of Claims held to be determinative of payment is PPM 21-4.1, paragraph 6u, dated December 30, 1960, which reads as follows:

> **"The amounts required to be paid for lands in public ownership shall be justified in the same manner and to the same extent as though the**

acquisition involved a private owner."

The Court of Claims, in interpreting this provision, relied upon the contractual agreement between the Federal Government and California under 23 U.S.C. section 106(a). This contract is in the form of the "Federal-Aid-Project Agreement" dated August 14, 1967, and under which California agreed to comply with the terms and conditions set forth in Title 23, United States Code, the regulations issued pursuant thereto and the "policy and procedures promulgated by the Federal Highway Administration" relative to the project.

California's position is that PPM 21-4.1, paragraph 6u, does not require that the State use the same appraisal methods for acquiring property in public ownership as for acquisitions from

private owners. The correct analysis of this memorandum would require the State to pay just compensation to both public and private owners and to furnish documentation justifying acquisition from both public and private owners.

To reach the conclusions drawn by the Federal Highway Administration and the Court of Claims you must completely ignore the requirements of the Fifth Amendment as applied in eminent domain proceedings to actions by the Federal Government, the Fourteenth Amendment as applied to land acquisitions by the various states, and California's own article I, section 14, which adopts the same just compensation standards as the Fourteenth Amendment.

The fundamental goal in all eminent domain proceedings is to pay just compensation for the property acquired. To

enact legislation or, as in this action policy and procedure memoranda which would give less than just compensation, is invalid. (United States v. Indian Creek Marble Co. (D.C. Tenn. 1941) 40 F.Supp. 811.) California urges that PPM 21-4.1, paragraph 6u, in requiring the State to use the Standard of Fair Market Value in the acquisition of public and private ownerships, deprives the public ownerships of the benefit of functional replacement.

California has consistently maintained that PPM 21-4.1, paragraph 6u, when it deprives a school district of just compensation under the Federal-Aid Highway Act, is violative of federal and State concepts of just compensation. (United States v. Miller (1943) 317 U.S. 369, 380.)

In United States v. Certain Property in Borough of Manhattan (2d Cir. 1968)

403 F.2d 800, the court stated the law regarding the acquisition of public improvements in this manner, at pages 802-804:

> "Under the Fifth Amendment, the owner of property in every condemnation case is entitled to 'just compensation.' The standard formulation for applying this Constitutional requirement is 'indemnity, measured in money, for the owner's loss of the condemned property.' Westchester County Park Commission v. United States, 143 F.2d 688, 691 (2 Cir.), cert. denied, 323 U.S. 726, 65 S.Ct. 59, 89 L.Ed. 583 (1944). The owner 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must

be made whole but is not entitled to more.' Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). In most cases the concept of 'market value,' i. e., what a willing buyer (one not forced to buy) would pay to a willing seller (one not forced to sell), is applied. The standard of fair market value--particularly with private condemnees --has proven practical and effective. Its variations are adaptable to many common situations: the comparable sales approach when the tract is one in an active commercial market; the capitalization of earnings standard for income-producing property, and the

reproduction cost minus depreciation measure of compensation if the building is a rarely traded speciality.

"The principle of fair market value, however, 'is not an absolute standard nor an exclusive method of evaluation.' United States v. Virginia Electric & Power Co., 365 U.S. 624, 633, 81 S.Ct. 784, 791, 5 L.Ed.2d 838 (1961). It should be abandoned 'when the nature of the property or its uses produce a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else.' United States v. Certain Land in Borough of Brooklyn,

346 F.2d 690, 694 (2 Cir. 1965). Frequently when public facilities are appropriated, the market value test is unworkable because these facilities are not commonly bought and sold in the open market, and seldom are operated for profit. Note, Just Compensation and the Public Condemnee, 75 Yale L.J. 1053 (1965). The result has been the development of the 'substitute facilities' doctrine to meet the unique needs of public condemnees. [Citations omitted.] Simply stated, this rule insures that sufficient damages will be awarded to finance a replacement for the condemned facility.

"The government argues that the substitution test is an 'exception' to the standard market value rule to be applied only when the condemnation involves a public road, sewer, bridge, or similar nonsalable service facility. Since the value of the land and building in the instant case was ascertainable by the market value concept, it contends that all damages compensable under the Fifth Amendment were awarded. We disagree.

"The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available

in public condemnation proceedings. United States v. City of New York, 168 F.2d 387, 390 (2 Cir. 1948); State of California v. United States, 395 F.2d 261, 266 (9 Cir. 1968). When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.

"When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. City of Fort Worth v. United States, supra,

188 F.2d at 223; Town of Clarksville v. United States, supra, 198 F.2d at 243. The duty may be legally compelled or one which arises from necessity, United States v. Des Moines County, supra, 148 F.2d at 449; the distinction has little practical significance in public condemnation. Insight into the usefulness and worth of community property may be gained as well from the responsible decisions of public officials and agencies acting under a broad mandate with discretionary powers, as from legislative determinations announced in statutes. Modern government requires that its administrators be

vested with the discretion to assess and reassess changing public needs. If application of the 'substitute facilities' theory depended on finding a statutory requirement, innumerable non-legal obligations to service the community would be ignored. Moreover, the 'legal necessity' test, applied woodenly, may provide a windfall if the condemned facility, though legally compelled, no longer serves a rational community need. We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of 'value' but by the loss to

the community occasioned by the condemnation." (Emphasis added.)

In Town of Clarksville, Va. v. United States (4th Cir. 1952) 198 F.2d 238, the court dealt with condemnation of a part of a town's sewer system and held that the taking might be compensated by paying the cost of a substitute. In dealing with this matter, Judge Dobie, speaking for the court, said at pages 242-243:

> "The general principles applicable to an eminent domain taking of municipal facilities are well established. The taking may be justly compensated by payment of the cost of a substitute, so long as a full equivalent is afforded for the property taken. [Citations omitted.] Of course, the interests of the public,

upon which the payment burden rests, are at stake, too and the award must not be in excess of strict equivalence. Yet we are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment's mandate. Accordingly, the equivalence requirement which must be met with respect to the substitute facility is more that of utility than of mere dollar and cents value. Jefferson County v. Tennessee Valley Authority, 6 Cir., 146 F.2d 564. And the substitute facility must be that which

the claimant is legally required to construct and maintain, whether or not this type be more expensive or efficient than the facility which was condemned. [Citations omitted.]" (Emphasis added.)

The State is at a loss to understand the strict adherence to the standard fair market value rule when the overwhelming weight of authority indicates that the "substitute facilities" rule should be used to meet the just compensation requirements of the Fifth Amendment. In State of California v. United States (9th Cir. 1968) 395 F.2d 261, at page 266, the court described the rule in this manner:

> "The rule requiring the payment of the cost of 'substitute facilities' is an

application of these principles, not an exception to them. It enables the court or jury to award the amount required as just compensation in situations where market value or other standards of valuation cannot rationally be applied or where their application would not put the owner 'in as good a position * * * as if his property had not been taken.' It cannot, consistently with the Fifth Amendment, be used to deny an owner compensation when a taking has inflicted loss. We have been cited to no case permitting such a use of the rule, and a suggestion by the United States that it might be so

employed was expressly rejected in United States v. City of Jacksonville, Arkansas, 257 F.2d 330 (8th Cir. 1958).

"The district court's ruling limiting the State of California to proof of need for substitute facilities was therefore error. The State was prejudiced if loss from the taking might have been established by other evidence."

Another case which deals directly with the condemnation of public facilities is City of Wichita v. Unified School District No. 259, 201 Kan. 110, 439 P.2d 162. This case dealt with the condemnation of a school for highways purposes. The school in that action had been constructed in 1918 with additions built in 1951 and 1955. The court in

that action, while quoting both case law and text writers, stated the following at page 168:

> "We believe the cases generally hold that where a public body sustains the loss of a facility essential to the performance of its public function, it is entitled to receive such compensation as will put it in as good a position pecuniarily as if its property had not been taken. (Mayor and Council of City of Baltimore v. United States, 4 Cir., 147 F.2d 786.) In United States v. State of Arkansas, 6 Cir., 164 F.2d 943, the court put it this way:
>
> "'* * * The fundamental principle is that the public

> authority charged with furnishing and maintaining the public way, whether it be a highway, a street or a bridge, must be awarded the "actual money loss which will be occasioned by the condemnation * * *" This amount is usually the cost of furnishing and constructing substitute roads. * * *' (p. 944.)
>
> "This principle contemplates that replacement costs are not to be diminished by deductions for depreciation or obsolescence. In City of Fort Worth, Tex. v. United States, 5 Cir., 188 F.2d 217, where the taking of city streets was involved, the court stated:

*** * * The cost of adequate substitute facilities to be so computed, is proper whether such sum be more or less than the value of the street and facilities taken. U. S. v. Los Angeles County, supra. We think the true rule in such cases is well stated in Jefferson County v. Tennessee Valley Authority, supra, 146 F.2d 564, 565, that "The practical view is to consider the road and highway needs of the civil division affected by the taking and to allow the governmental unit such sum in damages as will pay the cost of road facilities equal * * * to those destroyed. * * *" (Emphasis supplied) (p. 223.)"**

A. Policy and Procedure Memorandum 21-4.1, Paragraph 6u, Has Been Superseded.

The policy and procedure memorandum under which California was denied reimbursement is PPM 21-4.1, paragraph 6u, dated December 30, 1960.

This provision was changed when PPM 80-1, paragraph 51, became effective in November 1968. If this paragraph had been in effect in 1965, the State would have had an opportunity to demonstrate that a functional replacement of the facility was necessary to protect the public's interest and collect the full reimbursement.

Subsequently, even this policy was liberalized to provide functional replacement of real property in public ownership by the Federal-Aid Highway Program Manual effective May 29, 1974,

paragraph 5a, volume 7, chapter 2, section 2.

It should be noted that policy and procedure memoranda are not law and, in fact, the United States Department of Transportation does not consider that its Federal Highway Agency's policy and procedure memoranda have even the status of regulations (23 C.F.R. § 1.32(a) (1977); Lathan v. Brinegar (9th Cir. 1974) 506 F.2d 677). Further, the Supreme Court in Red Lion Broadcasting Co. v. F. C. C. (1969) 395 U.S. 367, referred to "the venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. ...". In the instant case, what can be more indicative that the policy and procedure memorandum was wrong,

than a change of that very regulation when litigation is pending challenging its validity.

The McKinley School was an operating facility with two school buildings constructed in 1959 and two constructed in 1961. It is a recognized fact that when public facilities are appropriated the market value test is unworkable because these facilities are not bought and sold in the open market, nor operated for profit. The result has been the development of the "substitute facilities" doctrine to meet the unique needs of public condemnees. This rule simply stated ensures that sufficient moneys will be awarded to replace the condemned facility (see e.g., United States v. Certain Property in Borough of Manhattan, supra; City of Fort Worth, Tex. v. United States (5th Cir. 1951) 188 F.2d 217). The State recognized this

principle and paid the school district the replacement cost of a new facility, as opposed to the depreciated value of the appraised school facilities, so that the school district would have a school of equal utility to replace the school taken by the highway project. If the State had not paid the additional $158,941.68, it would be tantamount to asking the school district to underwrite the highway system by that amount. The highway system is financed by all users and asking the taxpayers of this school district to pay an additional amount would in effect be a subsidization of the construction of this highway.

2. THE LAW OF CALIFORNIA GOVERNS WHAT COSTS ARE REIMBURSABLE BECAUSE CALIFORNIA LAW ON THE SUBJECT IS INCORPORATED INTO FEDERAL LAW AND PPM 21-4.1, PARAGRAPH 3a(2)

A. The Court of Claims Was Bound To Apply California Just Compensation Principles.

The concept of the "substitute facilities" doctrine is applied in California when public facilities are acquired when it is the only method which will restore the condemnee to his precondemnation position. This concept is entitled to reimbursement according to PPM 21-4.1, paragraph 3a(2), which obligates the United States to participate in right-of-way costs of the State that are incurred "pursuant to and in conformity with State law."

B. PPM 21-4.1, Paragraph 6u, As Applied By the Court of Claims Is Not Consistent With 23 U.S.C. Section 120(c).

PPM 21-4.1, paragraph 6u, is not consistent with 23 U.S.C. section 120(c).

The term "total" in 23 U.S.C. section 120(c) has a plain meaning. It means "whole, entire." Webster's Third Int. Dictionary, p. 2414. It means "not divided, lacking in no part, full, complete, the whole amount." Black's Law Dictionary, 4th Edition, p. 1661. See also: Piedmont Publishing Co. v. Rogers (1961) 193 Cal.App.2d 171, 188. Words used in a statute without limiting definition and without a legislative history indicating a contrary definition should be given their common and ordinary meaning. C. I. R. v. Brown (1965) 380 U.S. 563, 570, 571; Malat v. Riddell (1966) 383 U.S. 569, 571; Dobbs v. Train (N.D. Ga. 1975) 409 F.Supp. 432, 436. The legislative history of Title 23 does not indicate that the word "total" should mean other than "the whole amount," and in fact the history supports this meaning.

One aim of Congress in revising, codifying and enacting into law Title 23 of the United States Code was to bring clarity and conciseness into the laws applicable to the Federal-Aid Highway program. 1958 U.S. Cong. & Admin. News, p. 3944. A further goal of Congress in enacting the Federal-Aid Highway Act was that the United States pay 90 percent of the cost of the interstate highway system. 1959 U.S. Cong. & Admin. News, p. 2734. In 1968, the United States expanded its participation in advance acquisition of rights-of-way costs to include the entire costs of property management expenses as well as related moving and relocation expenses. 1968 U.S. Cong. & Admin. News, p. 3506; 23 U.S.C. section 108(2); 1966 U.S. Cong. & Admin. News, p. 2834.

The history of the present Federal-Aid Highway Act begins in 1916. The congressional purpose of the present act

is clear: to provide a clear and concise law to administer; to provide 90 percent of all necessary funds to the states for construction of interstate highways; and to expand federal participation for various items of cost involved in the acquisition of rights-of-way. Therefore, if there is any doubt as to the meaning of "total" as it relates to this issue, the doubt should be resolved in favor of its plain meaning: the whole amount.

Thus, from a reading of Title 23 as a whole, from information found in the congressional news reports, and from the plain language of Title 23, the intent of Congress is established that the United States participate in the total interest costs in question.

PPM 21-4.1, paragraph 6u, is therefore outside the authority of the Secretary's powers to make regulations or interpretive rules. To paraphrase the

court in Tullock v. State Highway Commission of Missouri (8th Cir. 1974) 507 F.2d 712, 716, the federal policy in question, PPM 21-4.1, paragraph 6u, goes beyond the specific language of 23 U.S.C. section 120(c) and must be struck down.

CONCLUSION

California has demonstrated that the provision relied upon by the Federal-Aid Highway Act in denying California reimbursement in the amount of $158,941.68 was a denial of just compensation principles applicable to the Federal Government by the Fifth Amendment and to state governments by the Fourteenth Amendment and California's own Constitution provision, article I, section 14, which contains the same requirements as the Fourteenth Amendment.

It should also be noted that prior to the filing of this action and approximately three years after the State had

contracted with McKinley School, the Federal Highway Administration distributed PPM 80-1, paragraph 51, which provided that in public acquisition, it is permissible to provide functional replacement. The present provision is now contained in Federal-Aid Highway Program Manual, volume 7, chapter 2, section 2, which allows functional replacement to the extent practicable under State law. What better evidence exists that PPM 21-4.1, paragraph 6u, was improper from its effective date until its repeal in approximately November of 1968 than the continued existence of policies which allow functional replacement? It also emphasizes that State law is the standard under which reimbursement must be dispensed.

The McKinley School was less than six years old at the time of acquisition by the State and as noted in Appendix E, the agreement of acquisition itself

required "a new school of comparable utility, so as to leave the School District, upon completion of construction of the new school, in the same relative position as it was prior to the acquisition of the McKinley School." Again, what better evidence that a functional replacement was necessary to place the condemnee in the same position pecuniarily as if his property had not been taken?

California has also shown that where costs of right-of-way are concerned, such costs are determined by reference to the applicable State law. For these reasons California prays that the Writ of Certiorari be granted and the decision of the Court of Claims be reversed.

DATED: June 17, 1977.

Respectfully Submitted,

HARRY S. FENTON, Chief Counsel
ROBERT F. CARLSON, Assistant Chief Counsel
MILTON B. KANE

By _____
MILTON B. KANE

Attorneys for Petitioner
State of California

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APPENDIX ONLY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HARRY S. FENTON, Chief Counsel
ROBERT F. CARLSON, Assistant Chief Counsel
MILTON B. KANE
BY: MILTON B. KANE
Attorneys for Department of Transportation
1120 N Street, P. O. Box 1438
Sacramento, California 95807
Telephone: (916) 445-3083
Attorneys for Petitioner

APPENDIX A

The California Department of Transportation brought a claim against the United States to recover additional costs incurred by the Department in acquiring the right-of-way for an interstate highway. The Court of Claims, Kashiwa, J., held that the State was not entitled to recover a sum representing the difference between replacement cost which the State had paid for the property and fair market value of the property, for which the State had been reimbursed.

Petition dismissed.

Highways 99-1/4

California Department of Transportation was entitled to recover from United States, under Federal-Aid Highways Act, only market value of school property obtained for use in construction of interstate highway, not greater cost of replacing school itself with another at different location. 23 U.S.C. §§ 101 et seq., 104, 104(b)(5), 105, 106, 106(a), 108, 108(a), 109, 110, 114, 120(c), 121(b), 315; Department of Transportation Act, § 6(a)(1), 49 U.S.C.A. § 1655 (a)(1); West's Ann.Cal.Const. Art. 1, § 14; U.S.C.A.Const. Amend. 5; 28 U.S.C.A. § 2501.

Milton B. Kane, Sacramento, Cal., atty. of record, for plaintiff. Gordon S. Baca, Sacramento, Cal., of counsel.

Stephen G. Anderson, with whom was Asst. Atty. Gen. Rex E. Lee, Washington, D. C., for defendant. Lawrence S. Smith, Washington, D. C., of counsel.

Before DAVIS, KASHIWA and KUNZIG, Judges.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

KASHIWA, Judge:

Plaintiff, the State of California, Department of Transportation, in this case asserts a claim founded upon an express contract with the United States under the Federal-Aid Highways Act (23 U.S.C. § 101, et seq. (1970)). Founding its claim under 23 U.S.C. § 106(a) (1970), plaintiff contends that it is entitled to the sum of $158,941.68, which represents the additional costs incurred by the State highway department in acquiring the right of way for an interstate highway. This sum represents the difference between replacement cost which the State paid for property and fair market value on which the Federal Highway Administration reimbursed the State. Since this case propounds no genuine issue as to any material fact, it is properly before the court on cross motions for summary judgment. For the reasons set forth below, we agree with the defendant that under the Federal-Aid Highways Act plaintiff has been fully paid. We, therefore, grant defendant's motion for summary judgment.

I.

The statutory and regulatory[1] scheme under which this case arises is as follows: The Federal-Aid Highways Act (also "Act")[2] provides for joint federal and state participation in the construction of certain highways, with the actual construction to be undertaken by the state "subject to the inspection and approval" of the Secretary of Transportation ("Secretary").[3] (§ 114; 49 U.S.C. § 1655(a)(1) (1970).) The Act prescribes the formula under which funds are apportioned among the several states for this purpose. (§ 104.) Highway projects must meet standards adopted by the Secretary under section 109, and states wishing to avail themselves of the benefits of federal assistance under the Act must submit their construction proposals to the Secretary for his approval. (§ 105.) The Secretary is authorized to make available to states funds for the acquisition of rights-of-way in anticipation of construction, under such rules and regulations as the Secretary may prescribe. Construction must take place within seven years thereafter. (§ 108(a) (1970).) If a proposed construction program is given approval, detailed plans, specifications and estimates must be submitted to the Secretary for his further approval. (§ 106.) When the Secretary approves the detailed plans for a specific project, the Act deems such approval "a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." (§ 106(a).) "As soon as practicable" thereafter, a "formal project agreement" for the construction

and maintenance of the project must be entered into between the Secretary and the appropriate state highway agency. (§ 110.) After completion of the project in accordance with the plans and specifications and after approval of the final voucher by the Secretary, a state is entitled "to payment out of the appropriate sums apportioned to it of the unpaid balance of the Federal share payable on account of such project." (§ 121(b).) The Secretary is authorized to prescribe and promulgate rules and regulations for the carrying out of the provisions of the Act. (§ 315.)

As previously noted, section 108 of the Act provides for making available funds to the states for the acquisition of rights-of-way in advance of construction, subject to such rules and regulations as the Secretary may prescribe. Policy and Procedure Memorandum ("PPM") 21-4.1 was promulgated in December 1960, effective February 15, 1961.[4] The regulation is entitled "RIGHT-OF-WAY PROCEDURES (State Acquisitions Under Federal-aid Procedures)." The purpose of the memorandum is stated in paragraph 1:

> The purpose of this memorandum is to prescribe the policies and procedures relating to Federal participation in right-of-way and property damage costs for which reimbursement is requested by the State under Federal-aid procedures.

Paragraph 5 of this regulation sets forth in detail numerous requirements which must be met by the state in order to obtain federal payments for right-of-way acquisitions. The standard of fair market value is referred to by the regulations as the basis for compensation for real property. For example, paragraph 5.j.(1) states, in part:

> (1) Determination of Fair Market Value by State Reviewing Appraiser: Within each State highway department, one or more individuals, hereinafter referred to as reviewing appraisers, are authorized to determine the fair market value of real property, which amount is to govern negotiations and settlements. * * *

Paragraph 4 of the regulation is captioned "STATE RIGHT-OF-WAY ORGANIZATION, POLICIES AND PROCEDURES." Paragraph 4.a requires that:

> a. The State shall transmit under the signature of the chief officer of the State highway department, in triplicate, to the division engineer information as to the regulations, procedures, and manner in which right-of-way matters are handled by the State. Such information shall include, but not be limited to the following statements:

There follows a listing of 35 items of information that the state is required to submit to the federal authorities.

The information called for by item (14) of this listing is:

> (14) When the State, in acquiring right-of-way, both by purchase and condemnation, becomes legally obligated to pay right-of-way costs.

Paragraph 3 of the regulation is captioned: "GENERAL PROVISIONS." Paragraph 3.a.(1) provides:

> a. Under Federal law and regulations, participation of Federal funds is permitted in right-of-way and property damage costs incurred by the States for highway projects financed in whole or in part with Federal funds under the circumstances and to the extent set forth below:
>
> (1) When there has been approval of a program and the State has been authorized to proceed with the right-of-way phase of a programmed project and the State subsequent to such authorization legally obligates itself under State law to pay right-of-way costs. The dates set forth by the State under paragraph 4a(14) shall be used in determining eligibility of right-of-way costs unless different dates are determined by Public Roads and included in its acceptance of the State's procedures.

As noted, paragraph 5 of the regulation, supra, sets forth numerous requirements that must be met by the state in order to obtain federal payments for right-of-way acquisitions. Paragraph 5.c provides, in part:

> c. Either at the time of program approval or subsequently, Public Roads shall issue a letter of authorization to the State to proceed with (1) studies to determine the relative right-of-way costs and other factors pertinent to alternate construction locations including incidentals connected with the acquisition of rights-of-way on a selected construction location, or (2) to actually acquire rights-of-way on a selected construction location including incidentals connected therewith, or (3) for both. * * *

Paragraph 6 of PPM 21-4.1 is captioned "ELIGIBILITY" and sets forth numerous criteria to be met in order for the right-of-way costs to be eligible for federal payment. Paragraph 6.a states:

> a. The authorization by the division engineer to proceed with acquisition of right-of-way shall constitute approval of the necessity for the right-of-way to be acquired and the general eligibility for Federal participation in the cost of right-of-way items. Such authorization shall be in accordance with paragraph 5c.

Paragraph 6.u of the same regulation specifies:

> u. The amounts required to be paid for lands in public ownership shall be justified in the same manner and to the same extent as though the acquisition involved a private owner.

Paragraph 6.u of PPM 21-4.1 was amended by paragraph 5.1 of PPM 80-1 which went into effect November 15, 1968. Paragraph 5.1 provides:

> Generally, the amounts required to be paid for lands or improvements in public ownership shall be justified in the same manner and to the same extent as though the acquisition involved a private owner. The exception to the foregoing general rule would occur where the State highway department can demonstrate and the Director of Public Roads concurs that the functional replacement of the facility is necessary to preserve and protect the public's interest. In such instances Federal funds may participate in the depreciated reproduction cost of the improvements exclusive of betterments and the reasonable cost of acquiring a substitute site.

II.

In the early 1960's, the California Division of Highways was developing plans for an interstate highway. The plans for the highway involved property known as the "McKinley School" in the Franklin-McKinley School District of Santa Clara County, California. In September 1963, the Division of Highways had an official appraisal made of the property. The appraisal report reflected the market value of the property as $763,549.25.[5]

Under Federal-aid procedures, relating to federal participation in right-of-way and property damage costs for which the State would be requesting reimbursement, the California Highway Transportation Agency, Department of Public Works, Division of Highways, submitted the information required under PPM 21-4.1. Pursuant to paragraph 4.a of this regulation, supra, a statement dated April 1964 was formally transmitted to the Division Engineer, Bureau of Public Roads, Department of Commerce, Sacramento, California, by letter dated May 14, 1964.

By letter to the State Highway Engineer, Sacramento, California, dated November 17, 1964, the Division Engineer, Bureau of Public Roads, United States Department of Commerce, authorized the State to proceed with negotiations for, and the purchase of, the right-of-way that included the school property involved in the instant proceeding.

On June 16, 1965, the California Division of Highways entered into an agreement with the Franklin-McKinley School District of Santa Clara County,

California, and the California Department of General Services for the acquisition of the McKinley School property and for the construction of a replacement school. The United States was not a party to the agreement and was not involved in the negotiation.

On August 14, 1967, the Bureau of Public Roads, United States Department of Transportation, and the Division of Highways, Department of Public Works, State of California, entered into a formal Federal-Aid Project Agreement. This agreement confirms the effective date of the rights-of-way authorization, namely, November 17, 1964, and obligates federal funds for the project in the amount of $19 million, the estimated total cost of the project being $22,400,000. The agreement is bilateral, being signed by both parties, and provides, in pertinent part, as follows:

> The State, through its Highway Department, having complied, or hereby agreeing to comply, with the terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto by the Secretary of Commerce and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project, and the Bureau of Public Roads having authorized certain work to proceed as evidence by the date entered opposite the specific item of work, Federal

> funds are obligated for the project not to exceed the amount shown herein, the balance of the estimated total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the Bureau of Public Roads authorization to proceed with the project involving such costs.

The Federal-Aid Highways Act provides a complicated formula for determining the federal share payable to a state for the highways built under its provisions; for highways of the category involved in this case in California, it can be stated, generally, that the share was about 92 percent. (See §§ 104(b)(5) and 120(c).) The state obtains payment of these funds by submitting requests for such payments in the form of vouchers, as prescribed by the Federal Highway Administrator. (25 Fed.Reg. 4162, May 11, 1960, § 1.31; 23 C.F.R. § 1.31.)

In due course, the date of which is not shown by plaintiff, the State Division of Highways requested payment of the federal share for the acquisition of the right-of-way involved herein. Although not expressly shown by plaintiff in its petition, brief or exhibits, the federal-share request by the State with respect to the McKinley School was apparently based on $922,490.43, presumably the total cost of replacing the school purchased for the right-of-way with another at a different location.[6] The federal share

paid was based on the fair market value of the property, $763,549.25.

The State's request for payment of the federal share, with respect to the McKinley School property, based on more than the market value of $763,549.25 was rejected by the Bureau of Public Roads. The Bureau relied on paragraph 6.u of PPM 21-4.1, supra, which was applicable at the time of the State's acquisition on June 11, 1965, of the school property. After unsuccessfully exhausting its administrative remedies, on August 4, 1975, plaintiff filed its petition in this court, seeking judgment for $158,941.68, plus interest thereon from June 16, 1965; its claim, founded upon § 106(a), represents an amount equal to the difference between replacement costs which the State paid for the McKinley property and fair market value on which the Federal Highway Administration reimbursed the State.

III.

Plaintiff recognizes that its claim is founded upon an express contract with the United States. Section 106(a) provides that approval by the Secretary of the plans, specifications and estimates for a given highway project submitted by a state shall constitute a contractual obligation of the Federal Government for payment of its proportional share. In the instant case these steps were taken and a contract resulted. This contract is in the form of the "Federal-Aid Project Agreement," dated August 14, 1967. In this bilateral document, it is provided that plaintiff has complied, or thereby

agrees to comply with the terms and conditions set forth in Title 23, U.S.Code, Highways, the regulations issued pursuant thereto and "the policy and procedures promulgated by the Federal Highway Administrator" relative to the project. It, thus became contractually bound, inter alia, by the provisions of the policy and procedure memoranda of the Government. The "regulations" involved here, PPM 21-4.1, were issued December 30, 1960, effective February 15, 1961.[7] A review of the provisions of those regulations show clearly that the basis for determining the federal share payable to the State for the instant property acquired was fair market value of the property. Nevertheless, plaintiff argues that the clear intent of Congress is to participate in the "total" cost of the construction of the highways, "without unilateral administrative decision excluding any portion of the cost of construction by the State." Plaintiff submits that there is no statutory basis for PPM 21-4.1 and, in fact, that it is squarely in conflict with the statutes upon which it is based; also, to the extent that PPM 21-4.1 denies just compensation, it is in violation of the Fifth Amendment of the United States Constitution and in violation of Article I, Section 14 of the Constitution of California.[8] We do not agree with the plaintiff.

The statute authorizes the Secretary to make available to states funds for the acquisition of rights-of-way in anticipation of construction under such rules and regulations as he may prescribe. (§§ 108, 315.) Pursuant thereto, the Secretary prescribed regulations which were

published in the Federal Register, which provided, inter alia, that federal-aid funds shall not participate in any cost which is not incurred in conformity with the policies and procedures prescribed by the Administrator.[9] As shown, the policies and procedures which were prescribed by the Administrator and in effect at the time involved herein provided that the amounts be paid for property in public ownership were to be justified in the same manner and to the same extent as though the acquisition involved a private owner, who was to be paid, under the regulation, fair market value. (PPM 21-4.1, paragraph 6.u.) Thus, under the regulation, the concept of determining the compensation on the basis of fair market value applied to acquisitions of both private and public property. To so provide is clearly within the scope of the statute and the regulations; plaintiff points to nothing to the contrary that is of any validity. Plaintiff argues that the payment to the State must be based on the "total cost * * * without unilateral administrative decision excluding any portion" of the State's cost of construction. This is incorrect. The regulation excludes numerous types of other costs which are not eligible for federal participation (see, e. g., PPM 21-4.1, paragraphs 6.b, 6.c, 6.i, 6.k, 6.m, 6.t). Furthermore, in a very recent case, the United States Court of Appeals for the Ninth Circuit upheld the principle that the terms of the Federal Highway Administration's Policy and Procedure Memorandum govern the amount payable to the state concerning highway programs under the Act and that the State of California was limited to such an amount

irrespective of the fact that it had expended more and sought recovery on the basis of the larger sum. The court specifically rejected the State's argument that it is entitled to recover on the basis of the "total cost" of the project, without regard to the regulations. People of the State of California v. United States, No. 75-1140 (9th Cir. September 30, 1976).

We also recognize plaintiff was on notice that the payment to it for the school property would be governed by PPM 21-4.1, under which the federal share was to be based on fair market value of the property. The State had notice not only of the regulations published in the Federal Register, but also of PPM 21-4.1, as shown by its submission to the federal authorities of the information and data called for by paragraph 4.a of PPM 21-4.1. Having knowledge of PPM 21-4.1 at the time it acquired the school property, plaintiff is bound by its terms regardless of whether the policy and procedure memorandum had been published as a regulation.[10] United States v. Aarons, 310 F.2d 341, 348 (2d Cir. 1962); Kessler v. Federal Communications Commission, 117 U.S.App.D.C. 130, 326 F.2d 673, 690 (1963). Furthermore, it is important to bear in mind that plaintiff, by a bilateral contract signed by representatives of defendant and of the State of California, agreed, inter alia, to comply with the terms and conditions set forth in the policies and procedures promulgated by the Federal Highway Administration. Having entered into an express contractual agreement with the Federal Government which provided the rules under which compensation was to be determined, it clearly is bound by that contract. This court has

so held in a similar situation, Eldorado Canyon Resort, Inc. v. United States, Ct.Cl., 538 F.2d 347 (Order of April 16, 1976); Bishop v. United States, 164 Ct.Cl. 717, 723 (1964) (Fifth Amendment taking cases). See also Commonwealth of Massachusetts v. Connor, 248 F.Supp. 656, 659 (D.Mass.), aff'd, 366 F.2d 778 (1st Cir. 1966). Having agreed to one basis of computing costs and determining the amount to be paid, the State cannot now disavow that express agreement. The terms of the contract govern and the claimant cannot recover on a different basis.

Nevertheless, plaintiff argues that the term "lands" as used in PPM 21-4.1, paragraph 6.u, supra, refers to lands only and not to improvements. Plaintiff reaches this conclusion by analyzing subsequently issued policy and procedure memoranda which use the phrase "lands or improvements." (See, e. g., PPM 80-1, paragraph 5.1, supra.) We, however, have carefully examined the 24 subparagraphs in paragraph 6, PPM 21-4.1, and have determined that the term "lands" as used in subparagraph 6.u means all real property. The other subparts of paragraph 6 use the terms "lands" and "real property" interchangeably; when the word "improvements" is used, it is in connection with rights-of-way acquired as land or real property. Furthermore, paragraph 5.q of PPM 21-4.1 shows clearly that the regulation uses the word "lands" to include improvements thereon, for it provides, in pertinent part:

> When lands are acquired for right-of-way purposes, all private installations thereon, except utility facilities the retention of which is clearly justified,

> shall be cleared therefrom prior to acceptance of the completed construction project, * *.

We find therefore, that there is no merit to plaintiff's contention in this regard.

Plaintiff has been paid in accordance with regulations to which it contractually agreed to be bound; it has no valid claim for any additional sum. We must, however, address plaintiff's constitutional argument.

Plaintiff argues that the provision under which the State was paid, paragraph 6.u of the regulation, "is unconstitutional as applied." Plaintiff first contends that the provision is in violation of the Fifth Amendment of the Constitution. We, however, do not find the Fifth Amendment applicable; plaintiff's claim is based solely upon an express contract with the United States. Next, plaintiff submits that under the California State Constitution the Federal Highway Administration "has no authority to enforce a regulation which requires a citizen of the State of California to accept less than just compensation nor does it have authority to force the State of California to pay less than just compensation when property is acquired by eminent domain." We feel that these are not the issues.

The Federal Highway Administration is not enforcing a regulation that "requires a citizen of the State of California to accept less than just compensation." As previously stated, defendant had an express contract with California under which the standard applied for payment is

made applicable by the terms of the agreement. The arrangement between the parties is purely contractual. Plaintiff recognizes this; its brief specifically states that its claim in this suit "is founded upon an express contract with the Federal Government under the Federal-Aid Highway Act, 23 U.S.C. Section 106(a)." Its motion for summary judgment also contains the identical statement. Since the relationship between the parties is contractual, and the claim is based on the express contract between the parties, the contract governs; under it, plaintiff has been paid in full and has no further claim against the defendant. Likewise, plaintiff's assertion that the Federal Highway Administration does not "have the authority to force the State of California to pay less than just compensation when property is acquired by eminent domain," is not an issue in the case. The Federal Highway Administration made an express contract with the California department of highways, whereby California, by virtue of its agreement with the defendant, agreed to accept the compensation prescribed by paragraph 6.u of PPM 21-4.1. The defendant's dealings were with the California highway department, not with an individual citizen of California. Obviously, there was no taking by the Federal Government from any landowner in California; the State of California had the only dealings with the individual landowners and it alone, not the Federal Government, is responsible for such dealings. In any event, plaintiff's argument is of no merit. In order to qualify for and receive federal funds under the Act, the State must comply with the applicable federal regulations; The Federal Government is not bound constitutionally or statutorily to grant federal

highway funds to states not complying with the federal guidelines. State of Nebraska, Department of Roads v. Tiemann, 510 F.2d 446, 448 (8th Cir. 1975); Port Authority of Saint Paul v. United States, 432 F.2d 455, 460, 193 Ct.Cl. 108, 117-118 (1970); and cases cited therein.[11]

Lastly, plaintiff argues that since the highway project was not completed prior to amendment of paragraph 6.u, PPM 21-4.1, by paragraph 5.1, PPM 80-1, then without retroactive waiver of the provisions of PPM 21-4.1, but by application of the regulation in effect at the time of payment, this court should allow California's claim. We find plaintiff's argument misleading. As previously demonstrated, PPM 21-4.1 was issued December, 1960, effective February 15, 1961. California became legally obligated to pay right-of-way costs for the McKinley School property on June 16, 1965, the date it executed the contract with the School District.[12] The amount payable to the California Division of Highways by the United States is governed by the regulations in effect on that date. On August 14, 1967, when California entered into the Federal-Aid Project Agreement with the United States, it knew that the amount it would receive from the United States would be on the basis of fair market value of the property. The new regulation, PPM 80-1, paragraph 5.1, did not become effective until November 15, 1968, over three years after California executed the contract with the School District for purchase of the McKinley property and more than one year after plaintiff entered into the Federal-Aid Project Agreement with the United States.

Thus, plaintiff agreed to pay the School District more than fair market value of the McKinley property based on its own volition and with knowledge that it would not be reimbursed by the United States for any sum greater than the amount payable on the basis of fair market value. As a result, there is no basis for applying the new regulation. The fact that the whole section of the highway being built was not completed until some time after the effective date of the new regulation is immaterial.

Pursuant to the contract between the parties and the regulations in effect at the time California became legally obligated to pay the right-of-way costs for the school property involved, plaintiff has been paid in full.[13]

CONCLUSION

For the foregoing reasons, we grant defendant's cross motion for summary judgment and deny plaintiff's motion for summary judgment. Plaintiff's petition is dismissed.

FOOTNOTES

1. In this opinion, we use the term "regulation" figuratively to refer to regulations published in the Federal Register and Code of Federal Regulations as well as to policy and procedure memoranda. See note 10, infra.

2. Unless otherwise indicated, all section references are to the Federal-Aid Highways Act, 23 U.S.C. § 101, et seq. (1970).

3. That Act was originally administered by the Department of Commerce. When the Department of Transportation was created in 1966, the functions, powers and duties of the Secretary of Commerce under the Act were transferred to the Secretary of Transportation.

4. The "regulations" involved herein are those issued by the Department of Commerce, Bureau of Public Roads, entitled Policy and Procedure Memorandum. See note 10, infra.

5. The appraisal reported the market value of the property as $763,549.25, which is the sum of $120,514.50 for land and $643,034.75 for improvements that included structures, equipment, yard improvements and utilities.

6. Plaintiff's petition and its brief imply that the total cost of the new school was $922,490.43; it claims the sum of $158,941.68, which (except for an insignificant discrepancy of 50 cents) is the difference between $922,490.43 and the appraised value of the school property, $763,549.25. However, in neither its petition nor its brief has plaintiff set forth any proof or documentation of the said total cost of the new school.

7. See note 10, infra.

8. Article I, Section 14 of the Constitution of the State of California provides:

> Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefore be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from

any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; * * *.

Article I, Section 14 was changed to Article I, Section 19, effective November 5, 1974.

9. The regulations were published in the Federal Register May 11, 1960, 25 Fed.Reg. 4162, et seq., and in the Code of Federal Regulations, 23 C.F.R. §§ 1.9, 1.14 and 1.32.

Section 1.9 provides as follows:

Federal-aid funds shall not participate in any cost which is not incurred in conformity with applicable Federal and State law, the regulations in this part, and policies and procedures prescribed by the Administrator. Federal funds shall not be paid on account of any costs incurred prior to authorization by the Administrator to the State highway department to proceed with the project or part thereof involving such cost.

Section 1.14 provides as follows:

Project agreements, and modifications thereof, shall be in forms satisfactory to the Administrator, evidencing acceptance by the State highway department of conditions to payment of Federal funds, as prescribed by Federal laws and the regulations in this part, and the amount of Federal funds obligated.

Section 1.32 provides as follows:

"The Administrator shall promulgate and require the observance of such policies and procedures, and may take such other action as he may deem necessary for carrying out the provisions and purposes of the Federal laws and the regulations in this part.

10. We recognize that the Department of Transportation had ruled that the Federal Highway Administration memoranda do not rise to the status of regulations, 23 C.F.R. § 1.32(a) (1973). However, this fact does not affect the result in the instant case since plaintiff had knowledge of the memorandum in issue at the time it acquired the McKinley property.

11. Plaintiff has not shown that the replacement value standard for public structures is so universally accepted in the United States that it might possibly be invalid for the Federal Highway Administration to refuse to accept it. A survey by the Government suggests that this standard is far from being universally adopted, and, though plaintiff cavils at the survey, it concedes flatly, in a post-argument submission to the court, that "the State of California does not contend that its recognition of the 'replacement cost' or 'substitute facilities' was a majority view in 1967" [when the contract in issue was executed].

12. In answer to paragraph 4.a.(14) of PPM 21-4.1, supra, requiring information as to when the State becomes legally obligated to pay right-of-way costs acquired by purchase, the State advised, in pertinent part, as follows:

> The State becomes legally obligated to pay right of way costs at the time the right of way contract is executed by the District Engineer on behalf of the State. The contract has previously been executed by the grantor and approved by Headquarters Right of Way Office. At the time the contract is executed by the District Engineer a letter transmitting the fully executed contract to the grantor

> is also prepared and the date of this letter is evidence of the date the State becomes legally obligated to pay.

* * * * * * * * * * *

13. As an affirmative defense, defendant raised the question of whether plaintiff's claim is barred by the six-year statute of limitations, 28 U.S.C. § 2501 (1970), in that plaintiff's petition filed August 4, 1975, asserts a claim for compensation which accrued on June 16, 1965, the date of plaintiff's agreement with the school district. However, in open court during oral argument, defendant abandoned this defense; as a result, we need not discuss it.

APPENDIX B

APPENDIX B

EMINENT DOMAIN Art. 1 § 14

§ 14. Eminent domain; just compensation; rights of way; reservoirs; payment of or security for compensation; logging or lumbering railroads

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir

purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier. (Amended Oct. 10, 1911; Nov. 5, 1918; Nov. 6, 1928; Nov. 6, 1934.)

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Apportionment of Representatives

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Disqualification for Public Office

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Public Debt, Guarantee of

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Power of Congress

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proposed June 13, 1866; ratified July 9, 1868; certified July 28, 1868.

APPENDIX C

APPENDIX C

TITLE 23

§ 101. Definitions and declaration of policy

(a) As used in this title, unless the context requires otherwise--

The term "apportionment" in accordance with section 104 of this title includes unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration in the Department of Commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, acquisition and rehabilitation, relocation, and construction of replacement housing, and improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas.

* * * * *

§ 106. Plans, specifications, and estimates

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

§ 120. Federal share payable

(c) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project on the Interstate System provided for by funds made available under the provisions of section 108(b) of the Federal-Aid Highway Act of 1956 [70 Stat. 378, 23 USC 158] shall be increased to 90 per centum of the total cost thereof, plus a percentage of the remaining 10 per centum of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area, except that such Federal share payable on any project in any State shall not exceed 95 per centum of the total cost of such project.

APPENDIX D

APPENDIX D

U.S. DEPARTMENT OF COMMERCE
BUREAU OF PUBLIC ROADS

POLICY AND PROCEDURE MEMORANDUM 21-4.1
(December 30, 1960)

1. PURPOSE

The purpose of this memorandum is to prescribe the policies and procedures relating to Federal participation in right-of-way and property damage costs for which reimbursement is requested by the State under Federal-aid procedures.

2. EFFECTIVE DATE AND APPLICABILITY

a. The changes made by this revision are effective as of February 15, 1961, with respect to all actions taken thereafter. Acquisitions subsequent to January 31, 1958, and prior to February 15, 1961, shall be supported in accordance with PPM 21-4.1 issued January 31, 1958, and the Instructional Memorandums being superseded by this memorandum. Acquisitions subsequent to December 31, 1956, and prior to January 31, 1958, shall be supported in accordance with PPM 21-4.1 issued December 31, 1956. Acquisitions prior to December 31, 1956, shall be supported in accordance with Section 3 of GAM 343 issued November 3, 1953. To the extent reasonable all acquisitions started prior to February 15, 1961, but not completed as of that date, are to be supported in accordance with this revision.

b. The provisions of this memorandum are not applicable to secondary road plan projects except to the extent made applicable by the secondary road plan submitted by the State and accepted by the Commissioner.

3. GENERAL PROVISIONS

a. Under Federal law and regulations, participation of Federal funds is permitted in right-of-way and property damage costs incurred by the States for highway projects financed in whole or in part with Federal funds under the circumstances and to the extent set forth below:

(1) When there has been approval of a program and the State has been authorized to proceed with the right-of-way phase of a programed project and the State subsequent to such authorization legally obligates itself under State law to pay right-of-way costs. The dates set forth by the State under paragraph 4a(14) shall be used in determining eligibility of right-of-way costs unless different dates are determined by Public Roads and included in its acceptance of the State's procedures.

(2) When such costs are incurred and paid pursuant to and in conformity with State law, except as provided in paragraph 6k.

(3) When such costs actually result in disbursements from public highway funds of the acquiring agency in obtaining rights-of-way over lands owned by a State or its subdivisions.

(4) Federal-aid funds participation may not exceed the statutory limitation for the particular Federal-aid funds used.

(5) On projects financed pursuant to the provisions of Title 23, U.S. Code, Section 120(d), for the elimination of hazards of railway-highway crossings, participation in the cost of right-of-way may not exceed one half of such cost with no increase in public-land States.

(6) On public-land projects, and on defense access road projects as defined in Title 23, U.S. Code, Section 210, the extent of Federal participation will be in accordance with specific agreements between Public Roads and the State highway departments.

(7) Reimbursement for such cost shall be made only after the project agreement has been executed for the particular project involved.

b. There may be participation of Federal Funds, not to exceed the extent set forth in Paragraph 3a, in severance or consequential damages or both resulting from a highway improvement project upon an affirmative showing that the State highway department is obligated to pay such damages under State law, and such damages are of a type generally compensable in eminent domain and are determined by Public Roads to be generally reimbursable on Federal-aid highway projects.

* * * * *

6. ELIGIBILITY

* * * * *

u. The amounts required to be paid for lands in public ownership shall be justified in the same manner and to the same extent as though the acquisition involved a private owner.

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF PUBLIC ROADS

POLICY AND PROCEDURE MEMORANDUM 80-1
(March 20, 1969)

1. PURPOSE

To prescribe the Bureau policies and procedures relating to right-of-way acquisition, occupancy, use and disposition.

2. EFFECTIVE DATE AND APPLICABILITY

a. The effective date of the 80 Series PPM's is July 1, 1967, except as otherwise provided. Previous memorandums shall govern all actions taken prior to July 1, 1967.

b. The provisions of the 80 Series PPM's are not applicable to secondary road plan projects, except to the extent made applicable by the secondary road plans submitted by the States and accepted by the Director and as required by paragraph 3a of PPM 80-5.

3. REIMBURSEMENT BASIS

a. Under Federal law and regulations, participation of Federal funds is permitted in right-of-way and property damage costs incurred by the States for highway projects financed in whole or in part with Federal funds under the circumstances and to the extent set forth below:

(1) When there has been approval of a program and the State has been authorized to proceed with the right-of-way phase

of a programmed project and the State subsequent to such authorization legally obligates itself under State law to pay right-of-way costs. The dates set forth by the State under paragraph 4a(14) shall be used in determining eligibility of right-of-way costs unless different dates are determined by Public Roads and included in its acceptance of the State's procedures.

(2) When such costs are incurred pursuant to and in conformity with State law, except as provided in paragraphs 5i, 5j and 5n of this memorandum.

(3) When such costs are recognized and recorded as a liability in the accounts of the highway department.

(4) Federal-aid funds participation may not exceed the statutory limitation for the particular Federal-aid funds used.

(5) On projects financed pursuant to the provisions of Title 23, U. S. Code, Section 120(d), for the elimination of hazards of railway-highway crossings, participation in the cost of right-of-way may not exceed one-half of such cost with no increase in public land States.

(6) On public-land projects, and on defense access roads projects, as defined in Title 23, U. S. Code, Sections 101 and 210, the extent of Federal participation will be in accordance with specific agreements between Public Roads and the State highway department.

(7) Reimbursement for such cost shall be made only after the project agreement has been executed for the project involved.

b. There may be participation of Federal funds, not to exceed the extent set forth in paragraph 3a, in severance or consequential damages or both resulting from a highway improvement project upon an affirmative showing that the State highway department is obligated to pay such damages under State law, and such damages are of a type generally compensable in eminent domain and are determined by Public Roads to be generally reimbursable on Federal-aid highway projects.

* * * * *

5. GENERAL PROVISIONS

* * * * *

1. Generally, the amounts required to be paid for lands or improvements in public ownership shall be justified in the same manner and to the same extent as though the acquisition involved a private owner. The exception to the foregoing general rule would occur where the State highway department can demonstrate and the Director of Public Roads concurs that the functional replacement of the facility is necessary to preserve and protect the public's interest. In such instances Federal funds may participate in the depreciated reproduction cost of the improvements, exclusive of betterments, and the reasonable cost of acquiring a substitute site.

U.S. DEPARTMENT OF TRANSPORTATION

FEDERAL HIGHWAY ADMINISTRATION

FEDERAL-AID HIGHWAY PROGRAM MANUAL

VOLUME 7 RIGHT-OF-WAY AND ENVIRONMENT

CHAPTER 2 THE ACQUISITION FUNCTION

SECTION 2 GENERAL PROVISIONS AND PROJECT PROCEDURES

SUBSECTION 1 FUNCTIONAL REPLACEMENT OF REAL PROPERTY IN PUBLIC OWNERSHIP

1. PURPOSE

* *This directive prescribes Federal Highway Administration (FHWA) policies on functional replacement of real property in public ownership.*

2. APPLICABILITY

The provisions of this directive are applicable, to the extent practicable under State law, to all States and political subdivisions thereof that acquire real property for any highway or highway related project in which

* Regulatory material is italicized

Federal funds will participate in any part of the right-of-way costs of the project. The provisions of paragraph 5 do not apply to real property owned by utilities or railroads.

3. AUTHORITY

a. 23 U.S.C. 315

b. 42 U.S.C. 4633

c. 23 CFR 1.32

4. FEDERAL LANDS

Acquisition of real property in Federal ownership shall be in accordance with FHWA directives on Federal land transfers.

5. FUNCTIONAL REPLACEMENT

a. *Where the State highway department (SHD) so requests, and can, pursuant to State law, incur costs for the functional replacement of real property in public ownership, Federal funds may participate in such replacement costs provided that it is demonstrated and FHWA concurs that functional replacement is in the public interest. Application of functional replacement procedures is at the SHD's election, subject to FHWA approval of a SHD's request.*

b. *For the purpose of this directive, functional replacement is defined as the replacement of real property, either lands or facilities, or both, acquired as a result of a highway or highway related project with lands or facilities, or both, which will provide equivalent utility.*

c. *Application of this policy, and Federal participation in costs pursuant thereto require that:*

(1) *the property to be functionally replaced is in public ownership,*

(2) *State law permits the incurrence of functional replacement costs,*

(3) *FHWA has concurred that functional replacement is in the public interest,*

(4) *FHWA has granted authorization to proceed on such basis prior to incurrence of costs,*

(5) *the functional replacement actually takes place, and the costs of replacement are actually incurred, and*

(6) *replacement sites and construction are in compliance with existing codes, laws, and zoning regulations for the area in which the facility is located.*

d. *Federal Participation*

(1) *Federal funds may participate in functional replacement costs on the following basis:*

(a) *the actual functional replacement cost of the facilities required to be replaced, and*

(b) *the appraised current fair market value of the land to be acquired for highway purposes when the owning agency has land on which to relocate the facilities, or the reasonable cost of acquiring a functionally equivalent substitute site where lands in the same public ownership are not available or suitable.*

(2) *Costs of increases in capacity and other betterments are not eligible for Federal participation except those necessary to replace utility; those required by existing codes, laws, and zoning regulations; and those related to reasonable prevailing standards for the type of facility being replaced.*

(3) *Where it is found that the appraised fair market value of the property to be acquired exceeds the cost of functional replacement, Federal funds may participate in the fair market value amount.*

e. *Procedures*

(1) *During the early stages of project development, SHD officials should meet with the owning agency to discuss the effect of a possible*

acquisition and potential application of functional replacement procedures. The results of discussions and decisions concerning functional replacement should be included in negative declarations, and environmental impact and Section 4(f) statements if required on a project.

(2) *At the earliest practicable time, the SHD shall have the property appraised and establish an amount it believes to be just compensation, and shall advise the owning agency of the amount established. Subject to the requirements of this directive, the owning agency has the option of accepting the amount of compensation established by the appraisal process or accepting functional replacement. The owning agency may waive its right to have an estimate of compensation established by the appraisal process if it prefers functional replacement.*

(3) *If the owning agency desires functional replacement, it should initiate a formal request to the SHD, and fully explain why it would be in the public interest.*

(4) *If the SHD agrees that functional replacement is necessary and in the public interest, it must submit a specific request for FHWA concurrence. The request should include:*

(a) *cost estimate data relative to contemplated solutions* (See Attachment 1 to this directive for a suggested format and items to be covered.),

(b) *agreements reached at meetings between the SHD and the owning agency, and*

(c) *an explanation of the basis for its request.*

The request shall include a statement that replacement property will be acquired in accordance with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and applicable FHWA directives.

(5) *After concurrence by FHWA that functional replacement is in the public interest, FHWA may, at SHD request, authorize the SHD to proceed with the acquisition of the substitute site and to proceed with physical construction of minor structures, or in the case of major improvements, to proceed with development of detailed plans, specifications and estimates.*

(6) *The plans, specifications, and estimates, and modifications thereof, shall be submitted to FHWA for review and approval in accordance with established procedures. Where major improvements are involved, advertising for bids and letting of the contract to construct the replacement facility may follow the general procedures utilized by the owning agency, if acceptable to the SHD and FHWA. The submission, where applicable, shall include provisions for SHD inspection during construction of the replacement facility.*

(7) *Prior to FHWA concurrence in the award for actual construction, an agreement shall be entered into setting forth the rights, obligations and duties of each party with regard to the facility being acquired, the acquisition of the replacement site, and the construction of the replacement facility. The executed agreement shall also set forth how the costs of the new facility are to be shared between the parties.*

(8) *The SHD's request for final payment shall include:*

(a) *A statement signed by an appropriate official of the owning agency and the SHD certifying that the cost of the replacement facility has actually been incurred in accordance with the provisions of the executed agreement.*

(b) *The statement shall also certify that a final inspection of the facility was made by the SHD and owning agency and that the SHD is released from any further responsibility.*

A summary of estimates or actual costs should be prepared to show applicable cost items. A suggested format is as follows:

Cost Items	Acquisition Based on Market Value Concept	Cost to Acquire Substitute Property	
Land	$_____	_____	
Buildings	_____	_____	
Facilities	_____	_____	
Damages	_____	_____	
Moving Costs	_____	_____	
Replacement Housing	_____	_____	
Other Items	_____	_____	$_____
Total	$_____		

	Cost to Cure or Functionally Replace	
Buildings	$_____	
Facilities	_____	
Other Items	_____ (+)	_____

	Nonparticipating Items (Betterments)	
(Identify Items)	$_____	
	_____	
	_____ (-)	_____
Total		$_____

Note: Exact breakdowns need not be given if property estimates are appropriate. Moving costs, replacement housing, and incidental expenses may be on averages or percentages similar to 104(b)5 estimates.

APPENDIX E

APPENDIX E

AGREEMENT FOR THE STATE ACQUISITION OF THE McKINLEY SCHOOL AND THE ACQUISITION AND CONSTRUCTION OF A REPLACEMENT SCHOOL

THIS AGREEMENT, executed this 16th day of June, 1965, by and between the State of California, acting by and through the Department of Public Works, Division of Highways, hereinafter called "Highways", and the Department of General Services, hereinafter called "General Services", and the Franklin-McKinley School District of Santa Clara County, hereinafter called "School District".

WITNESSETH THAT:

WHEREAS, in connection with the construction of the freeway described as Road 04-SC1-17 it will be necessary to acquire certain School District property, more particularly described as the "McKinley School"; and

WHEREAS, by reason of the acquisition of the McKinley School, it will be necessary to provide for the construction of a new school on a substitute site;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

A. SCHOOL DISTRICT SHALL:

(1) Immediately upon execution of this agreement, prepare plans and specifications for the construction of a new school on the site referred to in Paragraph B(1) hereinbelow, and all necessary incidents thereto, including, but not limited to, site preparation, paving, turfing, playground equipment, fencing and such items of onsite improvements as provided for from the general funds of the District as to the McKinley School, including, but not limited to, landscaping, sprinkler system and lawns. Said new school shall be of a size and quality of construction comparable to the McKinley

School in order to provide, as closely as possible, a new school of comparable utility, so as to leave the School District, upon completion of construction of the new school, in the same relative position as it was prior to the acquisition of the McKinley School.

(2) Upon approval of said plans and specifications by General Services, as provided for in Paragraph C(1), advertise, award and administer a construction contract in the manner prescribed by the Education Code of the State of California and other rules and regulations applicable thereto, for the construction of a new school.

(3) Present to General Services, for payment as provided for in Paragraph C(3), an itemized accounting of all monies expended and obligations incurred in connection with the construction of the new

school. All books, accounts and/or records of the District shall be open for review and audit by authorized representatives of Highways and General Services.

(4) Make every effort, where feasible, to utilize in the new school any equipment, such as furniture, desks, chairs and audiovisual equipment now located in the existing McKinley School. The final decision as to the feasibility of removing and resetting such equipment in the new school shall rest with the School District, subject to the approval of General Services.

(5) Upon completion and acceptance of construction of the new school, as referred to hereinabove, deliver to Highways a Grant Deed to the McKinley School (State Parcel 33003) free and clear of all liens, encumbrances, assessments, easements, leases and taxes, except:

(a) Covenants, conditions, restrictions and reservations of record, if any.

(b) Easements or rights of way over said land for public or quasi-public utility or public street purposes, if any.

(c) A future street line as shown on that certain record of survey for the School District filed for record November 9, 1959 in Book 83 of Maps at Page 56.

(6) Not later than thirty days after completion of construction of the new school and acceptance by the Governing Board of the District, deliver the property referred to in Paragraph A(5) hereinabove vacant

to Highways, in good order and condition, without further notice, and immediately thereafter deliver the keys thereto to the Division of Highways at 150 Oak Street, San Francisco, and also pay all closing utility bills up to and including the date of vacation.

(B) HIGHWAYS SHALL:

(1) At the earliest possible date, acquire for, and subsequently deliver to the School District, (as a substitute site for the McKinley School), a good and sufficient deed to the land outlined in red on the attached map, labeled Exhibit "A", and as described on attached Exhibit "B". Said conveyance shall be free and clear of all liens and encumbrances, except those exceptions set forth in Title Insurance and Trust Company's preliminary title report No. 252572, dated March 30, 1964. In the event the substitute site

cannot be acquired through a negotiated purchase, said site shall be acquired through a condemnation action pursuant to Streets and Highways Code, Section 104.2 et seq., and Highways shall assume all costs of handling the proceedings in connection therewith.

(2) Within 90 days after the substitute site has been acquired pursuant to the provisions of Paragraph B(1) hereinabove, clear the improvements located on said substitute site, leaving only concrete foundations and concrete flatwork; provided, however, that all mudsill steel tie bolts and reinforcing steel protruding from said remaining foundations shall be removed or sheared at all exposed surfaces of the concrete foundations; and in the event there are holes or basements under any of the buildings cleared, upon completion of the clearance operations

temporary barricades shall be constructed around holes or basements for the purpose of protecting pedestrians and animals from falling into such holes and basements.

(3) Within 30 days after execution of this agreement, deposit a warrant with the Treasurer of the County of Santa Clara in the amount of $100,000.00, payable to the Treasurer of the County of Santa Clara, for the account of the School District, to provide for the payment of the plans and specifications for the new school, as referred to in Paragraph A(1) hereinabove.

Deposit a series of progress payments with the Treasurer of the County of Santa Clara, payable to the Treasurer of said County, for the account of the School District, in amounts to be determined by General Services. Each such progress payment shall be deposited within

30 days after notice in writing from General Services to do so. The total of all such progress payments shall not exceed $744,776.00, which amount, together with the $100,000.00 provided for hereinabove, represents the estimated cost to provide for the construction of the new school, including, but not limited to, architects' fees, title report fees, inspection fees, plans and specifications, relocation of equipment as referred to in Paragraph A(4), and appraisal fees in the amount of $3,850.00 incurred by the School District in connection with the proposed acquisition and replacement of the McKinley School.

C. GENERAL SERVICES SHALL:

(1) Review and approve all plans and specifications for construction of the new school, including the relocation of equipment from the existing school to

the new school, as referred to in Paragraphs A(1) and A(4).

(2) In the event the District should elect to construct the new school on the substitute site of less than the present twenty-classroom McKinley School, determine the appropriate cash credit to remain in the School District account, as referred to in Paragraph B(3), which amount shall only be utilized for the construction of additional classrooms at a subsequent date, unless the use therefor is approved in writing for other purposes by General Services.

(3) Administer and authorize the necessary disbursements of the funds deposited as set forth in Paragraph B(3) hereinabove. Upon completion of the new school, and after all bills, fees and assessments have been presented for payment, a final accounting will be made,

and any excess monies on deposit, except any cash credits as provided for in Paragraph C(2) hereinabove, shall be returned to Highways. If a deficiency occurs, then Highways shall deposit funds to cover such deficiency with General Services.

IN WITNESS WHEREOF, The parties hereto have executed this Agreement this 16th day of June, 1965.

FRANKLIN-McKINLEY SCHOOL DISTRICT
OF SANTA CLARA COUNTY

By /s/ Jack Adams

/s/ Wilbur F. Sattler

/s/ John Feci

/s/ Anthony A. Mazotti

STATE OF CALIFORNIA
DEPARTMENT OF GENERAL SERVICES

By /s/ Paul I. Hoyenga

Local Assistance Officer

STATE OF CALIFORNIA
DEPARTMENT OF PUBLIC WORKS
DIVISION OF HIGHWAYS

By /s/ R. A. Hayler

District Engineer

No. 77-98

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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THE PEOPLE OF THE STATE OF CALIFORNIA, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for a writ of certiorari was not timely filed. The judgment of the Court of Claims in this case was entered on March 23, 1977. Under 28 U.S.C. 2101(c), the petition for a writ of certiorari was due to be filed within ninety days after the entry of judgment, *i.e.*, by June 21, 1977. The petition was not filed, however, until June 22, 1977 (a Wednesday). No extension of time was sought. The time limit specified by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

DOJ-1977-08